In the
Supreme Court of the United States
OCTOBER TERM 1960

No. ——

MINNEAPOLIS GAS COMPANY AND METROPOLITAN UTILITIES DISTRICT OF OMAHA

Petitioners

VS.

FEDERAL POWER COMMISSION

Respondent

CITY OF DULUTH, MINNESOTA, SUPERIOR WATER, LIGHT AND POWER COMPANY, MINNESOTA VALLEY NATURAL GAS COMPANY, NORTHERN NATURAL GAS COMPANY, IOWA PUBLIC SERVICE COMPANY, IOWA POWER AND LIGHT COMPANY, NORTHWESTERN PUBLIC SERVICE COMPANY, STATE OF MINNESOTA, WILLMAR GAS COMPANY, INC.

Intervener-Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Minneapolis Gas Company and Metropolitan Utilities District of Omaha pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled case on May 13, 1960.

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit, printed in Appendix A hereto, *infra*, p. 14 is reported at 278 F. 2d 870 (1960). The opinion of the Federal Power Commission (R. 363-397) is reported at 22 F. P. C. 164 (1959) and 30 P. U. R. 3d 104; the Commission's order denying rehearing (R. 407-415) is reported at 22 F. P. C. 523 (1959) and 30 P. U. R. 3d 123.

JURISDICTION

The judgment of the Court of Appeals was entered on May 13, 1960 (App. A, *infra*, p. 16). A timely petition for rehearing filed on May 27, 1960 (R. 421-429) was denied on June 10, 1960 (App. A, *infra*, p. 24). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1) and § 19(b) of the Natural Gas Act, 52 Stat. 831 (1938), as amended, 15 U. S. C. § 717r(b) (1958 ed.).

QUESTION PRESENTED

Whether, in a certificate proceeding under § 7 of the Natural Gas Act, the "public convenience and necessity" required the issuance of a certificate authorizing a major expansion of service by an interstate pipeline company where the Federal Power Commission's decision that the new extensions would be economically feasible to the pipeline assumed an excess of revenues over the cost of service for a given period on the pipeline's pre-expanded system and completely ignored the pipeline's admission in a contemporaneous rate increase filing with the Commission that a large revenue deficiency existed on the same existing system for the same period.

STATUTE INVOLVED

The pertinent provisions of the Natural Gas Act, *52 Stat. 821 (1938)*, as amended, *15 U. S. C. § 717, et seq.*, are set out in Appendix B, *infra*, pp. 26-29.

STATEMENT

This case involves a decision of the Federal Power Commission pursuant to jurisdiction conferred upon it by § 7 of the Natural Gas Act, *15 U.S.C. § 717f*, which was affirmed by the United States Court of Appeals for the District of Columbia Circuit, pursuant to jurisdiction vested in it by the review provisions of § 19(b) of the Act, *infra*, p. 28.

The proceedings before the Commission were initiated by Northern Natural Gas Company, an interstate pipeline company, filing with the Commission two applications for certificates of public convenience and necessity under § 7(e) of the Act, *infra*, p. 27. Authority was sought to construct and operate the facilities to provide new gas service to 342 communities located in six states.[1] The local distribution of gas within the communities would be performed by Northern's existing and proposed utility customers (other than petitioners). The facilities proposed to be built constituted the largest pipeline expansion ever proposed for Northern's system and included an extension of its main line, various pipeline loops of existing main line, additional main line compression, branch lines to the town borders of the proposed communities and town border measuring stations. The cost of constructing the proposed facilities was esti-

[1] Northern's separate distributing branch, Peoples Natural Gas Division, would distribute gas locally in 108, or about one-third, of these communities. Prior to the instant proceedings, Peoples Natural Gas Division of Northern served 110 communities—therefore, an addition of 108 would approximately double the number served by it.

mated to be approximately $110,400,000 over the first three years.

Prior to the instant proceeding Northern owned and operated a pipeline system originating in the panhandle of Texas and extending northeasterly through Kansas, Nebraska and Iowa to the cities of Minneapolis-St. Paul, Minnesota, with branches running easterly to Dubuque, Iowa, and northwesterly into South Dakota. Before expansion it served 387 communities with a total contract demand[1a] volume of 1.34 million Mcf[1b] per day; its investment in transmission facilities was 342 million dollars (R. 302). The proposed expansion would require an investment of 110 million dollars for an addition in Northern's contract demand volumes of .23 million Mcf per day in the third year of operation.

Petitioners are two local gas distributors which purchase all of their natural gas supply from Northern. Petitioner Minneapolis Gas Company serves about 211,000 retail customers in the City of Minneapolis and environs in the State of Minnesota. It is the largest customer on Northern's system and purchases about 19 percent of Northern's total sales of gas (R. 314). Petitioner Metropolitan Utilities District provides natural gas service in the City of Omaha and environs in the State of Nebraska. It is the third largest customer on Northern's system and purchases about nine percent of Northern's total sales of gas.

Northern is entitled under existing Commission precedents to recover its entire cost of service in its rates—therefore, petitioners will ultimately pay approximately 28 per-

[1a] "Contract demand" is the agreed maximum daily volume of gas that Northern is obligated to deliver and a utility customer company is entitled to receive.

[1b] "Mcf" is a standard unit for measuring the volume of natural gas and means "one thousand cubic feet".

cent of any revenue deficiency caused by any proposed expansion of service. Accordingly, petitioners intervened in the two dockets before the Commission, in light of the magnitude of Northern's proposed expansion and the direct impact on its revenues and cost of service, to protect themselves from any undue financial burden which would be caused by an uneconomic expansion of service (R. 315-323; 306-311).

The two applications were consolidated for hearing by the Commission and a hearing held before a Presiding Examiner which concluded on June 18, 1959. Petitioners' position in the hearing was that the majority of the expansion as proposed by Northern was not economically feasible because it would impose unreasonably large financial burdens on existing customers in the future—therefore, the "public convenience and necessity" did not require the issuance of a certificate.

Upon motion by Northern, the Commission omitted the intermediate decision procedure and held oral argument on July 17, 1959. Two weeks later, on July 31, 1959, the Commission issued its opinion and order (R. 363-397) in which it issued Northern a certificate to construct and operate the facilities to serve all 342 communities for the first three years upon certain conditions.

The Commission recognized that one of "the more important issues" in the proceeding was "whether various communities proposed to be served return so little of Northern's costs that they will increase the financial burden upon Northern's existing customers" (R. 367). In resolving this issue, the Commission found that the expansion project as proposed was not economically feasible to Northern because it would create substantial revenue deficiencies which would cast an undue burden on present customers. In its attempt to cure the uneconomic aspects of the proposed

expansion, the Commission required as a condition of the certificate that capital contributions be made for certain portions of the new facilities which were unsupported by revenues. If a local distributor for a proposed community on an uneconomic branch line did not agree to make the required contribution, gas service to that particular community would be denied. (R. 374-379.)

The Commission concluded that the feasibility of Northern's entire project would be enhanced as a result of its contribution plan (R. 378) and "it would appear that no undue burden will be placed on the present customers" (R. 379). The only findings regarding the economic feasibility of the proposed projects were in similar general language. Nowhere did the Commission find what the rate of return would be to Northern from the new extensions on either a systemwide or incremental basis.[2]

Eight days *after* the record had closed in this proceeding, on June 26, 1959, Northern filed its "eighth"[3] rate increase application with the Commission pursuant to § 4 of the Act, *15 U. S. C. § 717c*, in a different docket—No. G-19,040.

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[2] On a systemwide basis the new extensions are considered together with the pipeline's existing system. Here, a comparison of the cost and revenue figures for the pipeline's existing system (pre-expanded) is a requisite.

On an incremental basis the new extensions are viewed as independent segments without reference to a pipeline's existing system.

[3] Northern's "first" rate increase filing was made with the Commission in Docket No. G-1382 in March, 1950. The practice of Northern's utility customers is to number consecutively Northern's subsequent rate increase filings for convenience in referring to them.

Northern presently has pending its sixth, seventh and eighth rate increase filings under which it is collecting approximately 25 million dollars per year subject to the refund provisions of § 4 of the Act. The sixth was filed in Docket No. G-12,153 on February 27, 1957; the seventh was filed in Docket No. G-15,335 on May 27, 1958; the eighth was filed in Docket No. G-19,040 on June 26, 1959.

In this filing Northern requested increased rates in an amount of 8.5 million dollars per year to cover revenue deficiencies on its then existing (pre-expanded) system. These increased rates have been collected from petitioners and Northern's other customers since December 27, 1959, subject to the refund provisions of § 4. Although this rate filing was made five weeks *before* the Commission's decision herein and although the fact of the filing was presented at oral argument in the instant proceeding, the Commission completely ignored it and its impact on the proposed expansion of Northern's system. The Commission's order and opinion is silent on the point.

Rehearing was denied by the Commission on September 18, 1959 (R. 407-415). The Commission explained the purpose of the contribution plan developed by it,[4] but adhered to its previous position:

> "In any case, we do not hesitate to find that the contributions contemplated by our Opinion No. 324 will represent a reasonable amelioration of revenue deficiencies and, taken with the expected revenues will enable us to avoid denying service completely to the revenue deficient communities" (R. 410).

Again, no finding was made as to what the new facilities would return to Northern on either a systemwide or incremental basis.

Petitioners sought and were granted review in the Court below. When the answering brief of the Commission was received, petitioners were presented for the first time with a claim that Northern's systemwide revenues from jurisdic-

[4] "To ameliorate in some degree the pronounced revenue deficiencies a new method was employed of requiring as a condition of the certificate granted to Northern that capital contributions be made for that portion of the branch lines and metering stations unsupported by revenues" (R. 419).

tional services *after* expansion in the third year of operation would be approximately 1.5 million dollars more than its cost of service including a 6½% rate of return (Resp. Br., p. 23).[5] Northern's eighth rate increase filing was not considered in this calculation.

The petitioners met this argument at their first opportunity in their reply brief by showing that the reliance on systemwide revenues for the expanded system in excess of the systemwide cost of service was untenable in light of Northern's eighth rate increase filing (Pet. Rep. Br., pp. 2-8).

The Court below affirmed (App. A, *infra*, pp. 14-16). Its opinion was silent, however, on the impact of Northern's eighth rate filing on the Commission's opinion and order.

In their petition for rehearing filed on May 27, 1960, the petitioners again raised the contradiction between the basis of the Commission's opinion and the showing made by Northern in its eighth rate increase application (App. A, *infra*, pp. 17-24); the Court below denied rehearing on June 10, 1960 (App. A, *infra*, pp. 24-25).

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[5] The position of the intervener-respondents (including Northern) in the Court below was that the estimated revenues from Northern's expanded system in the third year of service would be more than the cost of service including a 6-1/2% rate of return by approximately .47 million dollars (Int. Br., p. 18). Northern's eighth rate increase filing was not considered in this calculation.

REASONS FOR GRANTING THE WRIT

I.

The decision of the Court below gives judicial sanction to the Commission's action of permitting an applicant in a pipeline certificate proceeding to use one set of cost and revenue figures for the economic feasibility of a proposed expansion, while permitting the same applicant in a contemporaneous rate increase proceeding, to use a materially different set of cost and revenue figures for the same period and on the same pipeline system for the raising of its rates.

A consideration of the cost of service and revenue figures contained in Northern's eighth rate increase filing is indispensable in the instant proceeding. The Commission, however, ignored the impact of the large revenue deficiencies shown by Northern in Docket No. G-19,040 for its pre-expanded system. The Commission's position, in its brief below, was that its decision regarding the feasibility of the proposed extensions was lawful because: Northern would receive systemwide revenues which were 1.5 million dollars in excess of its total cost of service (including a 6½% rate of return) in the third year of operating the new facilities.

This position is untenable as a matter of mathematical certainty when Northern's revenue and cost figures in this proceeding are compared with those in its eighth rate increase filing.

The proposed extensions when viewed independently (*i.e.*, on an incremental basis) will return to Northern 4.2 million dollars *less* than their total cost of service in the third year of operation (R. 266, L. 3 plus R. 278, L. 3). Therefore, if the Commission is correct that Northern will

have systemwide revenues in the third year of serving the new communities in excess of its total cost of service by 1.5 million dollars, Northern's pre-expanded system would have had to have "excess revenues" of 5.7 million dollars.[6]

Northern showed, however, in its eighth rate increase filing, not only that there were no "excess revenues" on its existing system, but that the revenues from its existing system were 8.5 million dollars deficient of meeting the cost of service (including a 6½% rate of return).[7]

The Commission's decision that the proposed extensions were economically feasible, using the phantom systemwide excess revenues, cannot be reconciled with Northern's eighth rate increase filing. If the excess revenues actually did exist, there would have been no eighth rate increase application by Northern—instead, a rate reduction by Northern would have been required. It appears that one set of cost-revenue figures was used for this case while at the same time another set was used for Northern's rate case on the same facilities and for the same period. The first opportunity that petitioners had to raise these matters was in their reply brief in the Court below.

The Court below either overlooked or misinterpreted these facts as evidenced by its affirmance of the Commis-

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[6] The systemwide figures reflect the estimated results of the operation of Northern's existing system (before expansion) plus the new extensions proposed herein. If the revenues from the new extensions are 4.2 million dollars less than the cost of service on the new extensions and the systemwide revenues are 1.5 million dollars more than the systemwide cost of service, *a fortiori*, Northern's existing system (before expansion) must have an excess of revenues over all costs of 5.7 million dollars.

[7] Northern's rate increase filing in Docket No. G-19,040 was for about 10 million dollars per year on its pre-expanded system, based upon a 6-3/4 percent rate of return. If a 6-1/2 percent rate of return had been used as was done in the instant proceeding, Northern's filing would have been in an amount of approximately 8.5 million dollars.

sion's opinion and order. These crucial events which came to light during the pendency of this appeal should not have been ignored. *City of Pittsburgh v. Federal Power Commission, 237 F. 2d 741, 752, fn. 33 (D. C. Cir. 1956).*

II.

If the decision of the Court below is allowed to stand, the requirement that proposed extensions of service be economically feasible to the applicant and not cast an undue burden on existing customers will be dropped as an element of the concept "public convenience and necessity" to the detriment of natural gas consumers everywhere.

This is a case of first impression in which the fundamentals of the requirement of economic feasibility as to extensions into new territory by a pipeline serving existing customers are being evolved. If the lower court's decision that the record herein supports the Commission's findings on economic feasibility is correct notwithstanding the direct contradiction of that record by Northern's admissions in its eighth rate increase application, the requirement of economic feasibility has been read out of the law to the detriment of the existing customers.

In *Atlantic Refining Co. v. Public Service Commission of New York, 360 U. S. 378 (1959)* this court was concerned with the economic effect on the ultimate consumer of gas purchases—here, the economic effect on the ultimate consumer of a major pipeline expansion is involved. To protect the consumer against exploitation in one of these areas and not the other will defeat the primary purpose of the Natural Gas Act. The impact of higher rates on the consumer is not lessened because the increases were triggered by uneconomic pipeline expansions of service rather than

unwarranted purchases of new gas supplies at high initial prices.

Petitioners (and the consumers of gas generally) have no protection against excessive gas prices caused by uneconomic expansions of service by a pipeline except the requirement of economic feasibility contained in the concept of "public convenience and necessity." This requirement and its intended protection are gone if one set of cost-revenue figures can be used by an applicant in a certificate proceeding under § 7 (to demonstrate that a pipeline system will generate sufficient revenues) while the same applicant can use a different set of cost-revenue figures in a rate proceeding under § 4 (to support a claim that the revenues are insufficient from the same facilities for the same period).

The Court's decision below overlooks the irreparable harm which will result to petitioners and the ultimate consumers served by them from affirmance of the Commission's opinion and order. When revenue deficiencies to Northern are caused by an uneconomic expansion, these deficiencies will be paid by the ultimate consumers in the form of higher rates. The economic risk of expansion is on the consumers, not on the pipeline company.

This is not a case where Northern has a legal duty, either by franchise or statute, to expand its facilities. The Natural Gas Act does not require, nor could the Commission force, Northern to extend its service involuntarily. The expansion here was voluntarily proposed by Northern and can be lawfully certified by the Commission only when required by the public convenience and necessity.

CONCLUSION

For all the foregoing reasons, it is urged that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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Dated: September 3, 1960.

APPENDIX A

United States Court of Appeals
for the District of Columbia Circuit

No. 15433

Minneapolis Gas Company, et al., Petitioners

v.

Federal Power Commission, Respondent

City of Duluth, Minnesota, Superior Water, Light and Power Company, Minnesota Valley Natural Gas Company, Northern Natural Gas Company, Iowa Public Service Company, Iowa Power and Light Company, Northwestern Public Service Company, State of Minnesota, Willmar Gas Company, Inc., Intervenors

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On Petition for Review of Orders of the
Federal Power Commission

Decided May 13, 1960

Mr. George C. Mastor, with whom Messrs. P. L. Farnand and George C. Pardee were on the brief, for petitioners.

Mr. Richard C. Steffey, Attorney, Federal Power Commission, of the bar of the Supreme Court of Virginia, pro hac vice, by special leave of court, with whom Messrs. Willard W. Gatchell, General Counsel, Federal Power Commission, Howard E. Wahrenbrock, Solicitor, Federal Power Commission, and Robert L. Russell, Assistant Gen-

eral Counsel, Federal Power Commission, were on the brief, for respondent.

Mr. Justin R. Wolf, with whom Mr. Charles A. Case, Jr., and Mrs. Louise C. Powell were on the briefs for intervenor Northern Natural Gas Company, argued for all intervenors except City of Duluth and Superior Water, Light and Power Company.

Mr. Harold J. Soderberg was on the brief for intervenor State of Minnesota.

Messrs. John W. Scott and Louis L. Da Pra were on the brief for intervenor Minnesota Valley Gas Company.

Mr. Robert S. Hunt was on the brief for intervenors Iowa Public Service Company, Iowa Power and Light Company, and Northwestern Public Service Company.

Mr. Bryce Rea, Jr., was on the brief for intervenor Willmar Gas Company.

Messrs. Glen H. Bell and Charles P. Seibold entered appearances for intervenors City of Duluth, Minnesota, and Superior Water, Light and Power Company.

Before Edgerton, Danaher, and Burger, Circuit Judges.

Edgerton, Circuit Judge: Petitioners seek review of the Federal Power Commission's opinion and order of July 31, 1959, and its order of September 18, 1959, granting certificates of public convenience and necessity under § 7(c) of the Natural Gas Act, 52 Stat. 825, as amended, 15 U. S. C. 717f(c). The orders authorize Northern Natural Gas Company to extend its pipelines and bring natural gas service to more than 300 communities in Nebraska, South Dakota, Iowa, Illinois, Wisconsin, and Minnesota. 22 FPC 164, 523.

Petitioners are local gas distributors that buy from Northern. They object to the Commission's orders because, on the basis of the rates now charged Northern's customers, the new service will not yield to Northern in the first three years as high a percentage of profit as the present service, and

may therefore tend to keep up the rates which petitioners pay to Northern.

The various parts of a public utility's system need not and cannot be equally profitable. Puget Sound Traction, Light & Power Co. v. Reynolds, 244 U.S. 574, 581. The record supports the Commission's finding that Northern's project will be economically "feasible particularly after * * * provisions * *.* for customers who may not pay their proper share of Northern's cost of service." Service on certain lines is authorized only on condition that the distributors on those lines make certain contributions to initial costs. The record also supports the Commission's conclusion that the new service is required by the public convenience and necessity. The Commission properly weighed the interests that will be served against those that will be injured and did not strike an arbitrary balance. Cf. Democrat Printing Co. v. Federal Communications Commission, 91 U.S.App.D.C. 72, 202 F. 2d 298.

Affirmed.

Before: Edgerton, Danaher and Burger, Circuit Judges.

JUDGMENT

This case came on to be heard on the record from the Federal Power Commission, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the orders of the Federal Power Commission on review in this case are affirmed.

per Circuit Judge Edgerton.

Dated: May 13, 1960.

Filed: May 13, 1960, Joseph W. Stewart, Clerk.

PETITION FOR REHEARING

To the United States Court of Appeals for the District of Columbia Circuit and the Judges thereof:

Petitioners in the above entitled case present this their petition for a rehearing of said case and hereby petition for rehearing by the full Court sitting en banc and, if the full Court denies rehearing, for rehearing by the division which rendered the decision of May 13, 1960, that division consisting of Edgerton, Danaher and Burger, Circuit Judges.

Petitioners' reasons for seeking rehearing are as follows:

I.

The Court either overlooked or misinterpreted the effect of Northern's eighth rate increase filing[1] in Docket No. G-19,040 when it stated:

> "The record supports the Commission's finding that Northern's project will be economically 'feasible particularly after * * * provisions * * * for customers who may not pay their proper share of Northern's cost of service.' * * *' The record also supports the Commission's conclusion that the new service is required by the public convenience and necessity. The Commission properly weighed the interests that will be served against those that will be injured and did not strike an arbitrary balance."

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[1] Northern's first rate increase filing was made with Respondent in Docket No. G-1382 in March, 1950. The practice of Northern's customer companies is to number Northern's subsequent rate increase filings consecutively for convenience in referring to them. Northern presently has pending its sixth, seventh and eighth rate increase filings under which it is collecting approximately 25 million dollars per year under bond.

The sixth was filed in Docket No. G-12,153 on February 27, 1957; the seventh was filed in Docket No. G-15,335 on May 27, 1958; the eighth was filed in Docket No. G-19,040 on June 26, 1959.

The basis for the Commission's decision on the economic feasibility of the new service was stated specifically for the first time in its brief (Resp. Br., p. 23):

> "Northern's revenues from jurisdictional services on its expanded system during the third year of the new services will be * * * more than its * * * total 'cost' of these services (all operating expenses, fixed costs including a 6½% profit, associated income taxes, etc.)."

The only mention of any specific rate of return to Northern in either the Commission's Opinion No. 324 (R. 11693-11720) or its Order Denying Rehearing (R. 11762-11767) was the following recital (R. 11700):

> "Northern estimates that in the third year of service to the 342 communities, it will earn in excess of a 6½% rate of return on its entire system although the rate of return on the incremental facilities to be constructed in the two dockets will be somewhat short of this, but will still represent a substantial return on its investment."

The consideration of Northern's eighth rate increase filing becomes vital when the economic feasibility of the new extensions is determined on a system-wide basis together with Northern's existing system.[2] In order for Northern to have a system-wide rate of return in excess of 6½% in the third

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[2] A comparison of the cost and revenue figures shown for Northern's existing system in this case with the cost and revenue figures shown for Northern's existing system in its eighth rate increase filing need not be made when the economic feasibility of the new extensions is considered on an incremental basis. On that basis the new extensions are viewed as independent segments without reference to the existing system or the system-wide rate of return.

year of service, it is necessary for the system *before* expansion to have a rate of return far in excess of 6½% in order to offset the large revenue deficiencies from the new extensions.

The eighth rate increase filing shows, however, that Northern's existing system is 8.5 million dollars short of meeting its cost of service with a 6½% rate of return in 1959—to say nothing of the third year of service to the new communities (Pet. Rep. Br., pp. 2-8). It is just not possible for Northern's existing system to have revenues in excess of its cost of service as stated by the Commission in this case and, at the same time, to be 8.5 million dollars deficient in meeting its cost of service as claimed by Northern in Docket No. G-19,040.

Petitioners had no opportunity whatever in the hearings below to present evidence or to be heard on the economic feasibility of the new service in light of the higher cost and lower revenues contained in Northern's eighth rate filing.[3] In response to the Commission's statement (first advanced in its brief) that Northern's system-wide rate of return would be in excess of 6½% in the third year of the new service, the Petitioners emphasized, both in their Reply Brief (Pet. Rep. Br., pp. 2-8) and at oral argument, that the cost and revenue figures in this case are directly contradicted by those contained in the eighth rate case.

The Court's decision sanctions the Commission's action in permitting Northern to use one set of cost and revenue figures in this certificate case *while at the same time it used a different set of figures with higher costs and lower rev-*

[3] The record before the Commission closed on June 18, 1959 (R. 11695). *Eight days later*, on June 26, 1959, Northern filed its eighth rate increase application in Docket No. G-19,040—this filing was made five weeks before the Commission issued its Opinion No. 324 herein granting the certificates to Northern.

enues in a rate increase case in a different docket.[4] The Commission completely ignored the impact of Northern's eighth rate increase filing on the economic feasibility of the new extensions and on Northern's system-wide rate of return after expansion—notwithstanding the fact that Northern's rate increase filing was made in Docket No. G-19,040, five weeks before the Commission's decision herein was issued. The Commission therefore did not properly weigh the interests that will be served against those that will be injured.

On the facts before this Court it is financially impossible for Northern to earn a system-wide rate of return in excess of 6½% in the third year of the new service because of the current revenue deficiencies shown by Northern for its existing system in Docket No. G-19,040 (Pet. Rep. Br., pp. 2-8).[5]

The differences between the figures used in these two cases for the same items are major (Pet. Rep. Br., pp. 2-10) but may be pointedly illustrated by referring to the cost of construction of the extension to Duluth, Minnesota, and the first-year sales figures estimated for Duluth. Here, the cost of constructing the Duluth extension was shown at $12,794,900 (R. 4227—$12,302,800 plus 4% for interest and overheads); in Northern's rate case the cost of the same item is shown at $14,498,600 (Docket No. G-19,040, Ex.

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[4] Docket No. G-19,040—Northern has been collecting this rate increase subject to refund since December 27, 1959.

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[5] Also, it is financially impossible because of the withdrawal of the Minnesota Iron Range project as certified by the Commission. By letter to the Commission dated March 14, 1960, Iron Ranges Natural Gas Company, the proposed distributor for the area, officially abandoned the project as certified. The revenue deficiencies to Northern therefore will be greater by $608,984 per year than before the Commission granted the certificates conditioned upon certain contributions being made toward initial costs (Pet. Br., pp. 36-37).

No. 1, Sch. C-2, Sh. 2, lines 31-34) *or 16.8% higher*. Here, the first-year sales for Duluth were estimated at 7,425,803 Mcf (R. 5090); in the rate case, the first-year sales for Duluth were estimated at 2,719,300 Mcf (Docket No. G-19,040, Ex. No. 3, p. 18, line 22, col. 4) *or 63.4% less*.

The Petitioners have been whipsawed between the low cost-high revenue figures used by Northern and the Commission to test the feasibility of the proposed extensions and the high cost-low revenue figures contained in Northern's eighth rate filing, Docket No. G-19,040, which form the basis for the rates which are now being paid to Northern subject to refund.

The evidence as to Northern's costs and revenues contained in the eighth rate increase filing, Docket No. G-19,040, is material to a determination of the issues in this case. This evidence was not part of the record before the Commission and was not considered by it. The Petitioners could not adduce such evidence in the proceedings before the Commission because the eighth rate increase filing was made by Northern eight days after the record below had closed—in fact, the first knowledge Petitioners had that the Commission based its decision upon the finding that Northern would have system-wide revenues sufficient to pay its entire cost of service including a 6½% rate of return in the third year of the new service was when Petitioners received the Commission's brief in this case. Petitioners, therefore, apply to this court as part of this Petition for Rehearing and pursuant to § 19(b) of the Natural Gas Act, *15 U.S.C. § 717r(b)*, for leave to adduce additional evidence; Petitioners request that the proceedings be remanded to the Commission for further hearings so that evidence may be taken on the costs and revenues shown by Northern in its eighth rate increase filing and the effect of

such evidence upon the economic feasibility of the new extensions of service.

II.

The Court misinterpreted Petitioners' basis for appeal, as evidenced by the following statement:

> "* * * They object to the Commission's orders because, on the basis of the rates now charged Northern's customers, the new service will not yield in the first three years as high a percentage of profit as the present service, and may therefore tend to keep up the rates which petitioners pay to Northern."

Northern's stated policy is to obtain a 6½% rate of return on all of its operations (R. 3345). The new service will return so little revenue to Northern that its revenues will be deficient by a minimum of $16,610,314 in the first three years of service (Pet. Br., pp. 34-40; Pet. Rep. Br., pp. 12-13, 15-16) and an indeterminate amount continuing thereafter. Thirty-two percent of this revenue deficiency caused by the new service will have to be paid by Petitioners and the balance by Northern's other existing customers because, under existing Commission precedents, pipelines are entitled to recover their entire cost of service in increased rates. Petitioners object in this case because they will be forced to pay unreasonably large rate increases to Northern in the future which will be directly attributable to the uneconomic extensions.

III.

The Court's opinion and decision overlook the irreparable harm which will result to Petitioners and the consumers served by them. When the large revenue deficiencies which

will result from the new service appear in Northern's future rate increase filings, there is no remedy available to protect the Petitioners against this undue financial burden. The pipeline costs which originate in certificate cases are collected from all customers in subsequent rate cases. The alternative to this irreparable damage is to remand the proceedings so that the Commission may re-examine its findings in light of Northern's higher costs and lower revenues contained in the eighth rate increase filing and in light of the withdrawal of the Minnesota Iron Range project.

The situation with Northern in this case is distinguishable from that of a local distributor which has a legal duty, either by franchise or statute, to serve everyone within a certain geographical area. An expansion of facilities under *§ 7, 15 U.S.C. § 717f*, of the Natural Gas Act is proper only when the minimum elements of "public convenience and necessity," including the economic feasibility of the new facilities have been proved. Northern voluntarily proposed this expansion and can complete it without any economic risk since the expense, including any revenue deficiencies, will ultimately be paid by Petitioners and other existing utility customers.

Conclusion

For the reasons stated above, Petitioners request that a rehearing be granted by the full Court, sitting en banc, and if denied by the full Court, by the division which rendered the decision of May 13, 1960, and that on such rehearing the judgment of this Court be reversed and these proceedings remanded to the Commission for further hearings concerning the economic feasibility of the communities listed in Appendix B to Petitioners' brief herein (pp. 3a-7a) in light of the revenue deficiencies shown by Northern in

Docket No. G-19,040 and the withdrawal of the Minnesota Iron Range project.

Respectfully submitted,

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Filed May 27, 1960, Joseph W. Stewart, Clerk.

Before: Edgerton, Danaher, and Burger, Circuit Judges, in Chambers.

ORDER

Upon consideration of petitioners' petition for rehearing, it is

Ordered by the court that the petition for rehearing is denied.

Per Curiam.

Dated: June 10, 1960
Filed June 10, 1960, Joseph W. Stewart, Clerk.

Before: Prettyman, Chief Judge, Edgerton, Wilbur K. Miller, Bazelon, Fahy, Washington, Danaher, Bastian and Burger, Circuit Judges, in Chambers.

ORDER

Upon consideration of petitioners' petition for a rehearing en banc, it is

Ordered by the court that the petition for rehearing en banc is denied.

Per Curiam.
Dated: June 10, 1960

Filed June 10, 1960, Joseph W Stewart, Clerk.

APPENDIX B

The Natural Gas Act, *52 Stat. 821* (1938), as amended, *15 U.S.C. § 717 et seq.*, provides in pertinent part, as follows:

Sec. 7. [15 U.S.C. §717f] **Construction, extension, or abandonment of facilities; certificate of convenience and necessity; condemnation proceedings.**

* * * * *

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however*, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

* * * * *

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have

the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

* * * * *

Sec. 19(b). [15 U.S.C. §717r(b)] **Rehearings; court review of orders.**

(b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in Section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evi-

dence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28. As amended Aug. 28, 1958, Pub. L. 85-791, § 19, 72 Stat. 947.

FILE COPY

No. 390

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In the Supreme Court of the United States

OCTOBER TERM, 1960

MINNEAPOLIS GAS COMPANY AND METROPOLITAN UTILITIES DISTRICT OF OMAHA, PETITIONERS

v.

FEDERAL POWER COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

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OPINIONS BELOW

The orders of the Federal Power Commission (R. 368–397; R. 407–415) [1] are reported at 22 F.P.C. 164 and 523. The opinion of the court of appeals (Pet. 14–16) is reported at 278 F. 2d 870.

JURISDICTION

The judgment of the court of appeals was entered on May 13, 1960 (Pet. 16). Petitions for rehearing and for rehearing *en banc* were denied on June 10, 1960 (Pet. 24–25). The petition for a writ of certiorari was filed September 6, 1960. The jurisdiction

[1] "R." refers to the joint appendix filed in the court of appeals.

of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTIONS PRESENTED

1. Whether the Federal Power Commission's finding that a proposed expansion of facilities and service by a natural gas company was economically feasible and required by the public convenience and necessity was supported by the record.

2. Whether a rate-increase application filed by the natural gas company after the termination of the certification hearings, based on a prospective increase in the cost of gas supplies and a claimed right to a higher rate of return, required reopening of the hearings.

3. Whether the contention that the rate-increase application required reopening of the hearings, made for the first time in a reply brief in the court of appeals although the application had been filed before oral argument to the Commission, was barred by the provision of Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b), foreclosing objections not presented to the Commission in an application for rehearing.

STATUTES INVOLVED

Sections 7(c), 7(e) and 19(b) of the Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. 717, 717f, 717r, are set forth in the appendix to the petition (Pet. 26–29).

STATEMENT

Petitioners, two local natural gas distributors serving Minneapolis, Minnesota, and Omaha, Nebraska, purchase their supplies of gas from the inter-

state pipeline system of the Northern Natural Gas Company. They filed in the court below a petition seeking review of an order of the Federal Power Commission granting Northern certificates of public convenience and necessity for system extensions. The court below affirmed the Commission's order. The pertinent facts follow:

Northern's applications and the proceedings before the Commission. On January 12, 1959, Northern filed with the Commission two applications for certificates of public convenience and necessity pursuant to Section 7 of the Natural Gas Act, 15 U.S.C. 717f. In Docket No. G-17485, Northern sought authorization to extend its existing natural gas pipeline system beyond Minneapolis, Minnesota, by constructing and operating approximately 170 miles of pipeline to Duluth, Minnesota, and Superior, Wisconsin, in order to make available for the first time natural gas service to those cities and to 37 other communities located along the route of the proposed extension. In Docket No. G-17486, Northern sought authorization to construct and operate facilities to provide initial natural gas service to 303 communities in Nebraska, South Dakota, Iowa, Illinois, Wisconsin and Minnesota. The facilities proposed in the two applications included the main line extension to Duluth and Superior, main-line loops of the existing system, additional main-line compression, branch pipelines to the new communities, and town-border measuring stations. The original total estimated construction cost was approximately $115,000,000 (R. 364-365).

Petitioners (R. 306–311, 315–328) and numerous other interested parties[1] were permitted to intervene in the certificate proceedings, and hearings on the two applications were consolidated. The hearings commenced on April 20, 1959, and concluded on June 18, 1959, after 27 actual hearing days (R. 366). Northern presented evidence which showed that with estimated revenues, based on the rates it was then collecting from present customers, and the added costs of providing the new services, the expanded system *as a whole* would earn during the third year in excess of the 6½% rate of return which the rates were intended to produce (R. 149, 253, 254, 264–265 276, 277). Exhibits introduced by Commission staff witnesses supported Northern's showing of an estimated *system-wide* rate of return of 6½% (R. 150–156, 238–242, 297–299). In addition, Northern introduced evidence that the *incremental* rate of return on the new facilities, without reference to Northern's system-wide operations, would be somewhat short of 6½%, but would still represent a substantial return on its investment (R. 266, 278, 373–374).

The intermediate decision procedure was omitted, and oral argument was heard before the Commission on July 17, 1959 (R. 335). In the oral argument, reference was made to an application for a

[1] In addition to the State of Minnesota, the Public Service Commission of Wisconsin, and the Illinois Commerce Commission, which filed notices of intervention, the Federal Power Commission permitted the intervention of 47 parties (R. 366). The interveners included a number of existing utility customers of Northern and various distribution companies and municipalities seeking initial service from Northern.

rate increase Northern had filed after the hearing on the certificate applications had been closed (Pet. 7),[4] but no request was made to consolidate the two proceedings or to defer the certificate proceeding pending hearing on the new increased rates.

On July 31, 1959, the Commission issued its opinion and accompanying order in which it granted Northern's applications for certificates of public convenience and necessity for the construction and operation of the facilities to serve the 342 communities, upon the condition that 124 of the communities either make stated capital contributions or be eliminated (R. 377–378, 387–389).

The Commission found that, considering Northern's system as a whole, "its project will be feasible" particularly after the provision for contributions by communities on certain of the branch lines (R. 373–374, 377–378). The Commission further found that, with the capital contributions it was requiring, "it would appear that no undue burden will be placed on the present customers" (R. 379).

On August 27, 1959, petitioners filed a joint application for rehearing (R. 336). In this application, petitioners presented no objection based on the filing of

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[4] On June 26, 1959, eight days after the closing of the record in these proceedings, Northern filed a separate rate increase application, *Northern Natural Gas Company*, Docket No. G-19040. Part of the increase was attributable to Northern's efforts to obtain a rate of return of 6¾% instead of 6½%, and the balance was for prospective increases in the cost of gas purchased by Northern. The Commission set the increase for hearing and suspended it for the full statutory period, after which it went into effect subject to refund of any amounts not ultimately found justified.

the application for a rate increase by Northern in Docket No. G–19040 on June 26, 1959. Their attack was solely upon the economic feasibility of the project on the record then before the Commission. Specifically, petitioners requested that the capital contributions required by the Commission on certain of the branch lines be increased to defray more of the capital costs of providing the new services (R. 336–358).

On September 18, 1959, the Commission denied the application for rehearing, holding, *inter alia*, that there was no requirement that each service rendered by the utility produce revenues equivalent to those of the other services (R. 409); that the application by petitioners set forth no new facts or principles of law not fully considered by the Commission in its prior opinion; and that no change or modification of such opinion was warranted (R. 414).[4]

Proceedings in the court of appeals. On November 12, 1959, petitioners sought review in the United States Court of Appeals for the District of Columbia. Again, petitioners raised no question respecting the rate increase application filed by Northern with the Commission on June 26, 1959. Rather, they maintained, as they had on their motion for rehearing before the Commission, that on the record the project was not economically feasible (R. 2–12). In its answering brief (pp. 23–24), the Commission refuted petitioners' argument of lack of economic feasibility by relying, in

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[4] On petition of Northwestern Public Service Company, the Commission modified its prior order to permit construction of the facilities represented by the required capital contributions in lieu of making such contributions (R. 413–414).

part, on certain mathematical computations made from the evidence in the record on Northern's revenues and costs. In their reply brief (pp. 2–8), petitioners for the first time contended that the project was not economically feasible in the light of the costs shown in Northern's last rate increase application.

On May 13, 1960, the court of appeals affirmed the Commission's orders. It held, *inter alia*, that the various parts of a public utility system need not and cannot be equally profitable; that the record supported the Commission's finding of economic feasibility and its conclusion that the new service was required by the public convenience and necessity; and that the Commission properly weighed the interests that would be served against those that would be injured and did not strike an arbitrary balance (Pet. 14–16).

In petitions for rehearing and for a rehearing *en banc*, petitioners, maintaining that they had "no opportunity whatever * * * to be heard" by the Commission on the economic feasibility of the new service in the light of Northern's recent rate increase application, requested that judgment be reversed and the proceedings be remanded to the Commission for further hearings (Pet. 17–24). The petitions were denied on June 10, 1960 (Pet. 24–25).

ARGUMENT

The decision of the court below presents no broad legal question of public importance. It turns upon the particular facts of record and was entirely cor-

rect. What petitioners are here seeking is an opportunity to retry the matters before the Commission on an entirely different theory. We show below that that theory is invalid and, in any event, not available to petitioners since they failed to present it to the Commission in their petition for rehearing. In the circumstances there is no need for further review by this Court.

1. Both before the Commission and in their petition for review in the court of appeals, petitioners argued that there was insufficient evidence *in the record* to support the Commission's finding that Northern Natural Gas Company's proposed expansion project was "economically feasible", and that, hence, the Commission erred in concluding that the public convenience and necessity required the proposed services.[5] Specifically, petitioners maintained that the revenues from certain of the communities proposed to be served would so far fall short of meeting Northern's costs that there would result an undue financial burden upon petitioners. The evidence presented went to that question, and the Commission gave it full consideration.[6]

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[5] No question was raised as to the adequacy of the proposed facilities from an engineering standpoint, as to the reasonableness of Northern's construction cost estimates, or as to its ability to finance the project. And the Commission found the gas supply adequate, although petitioners did not raise the issue (R. 367–370).

[6] In its opinion the Commission said: "The question therefore arises as to whether the revenues to be obtained from the contemplated new service will be great enough to offset the costs associated with the construction of the branch lines and meter-

Northern had supported its applications for certificates with estimates of revenues from the new service at the rates it was currently charging its present customers. Those rates were the ones then being charged pursuant to a rate increase filed May 27, 1958, and pending at the time of the hearing.[7] Northern presented evidence to show that, with those revenues, and the added costs of providing the new services, the expanded system *as a whole* would yield, in the third year of the new services, in excess of the 6½% rate of return which the rates were intended to produce.[8] Supporting exhibits were presented by Commission staff witnesses, without objection by petitioners.[9]

The Commission accepted Northern's estimates showing *system-wide* revenues after expansion in excess of a 6½% rate of return, recognizing at the same time that "the rate of return on the *incremental* facil-

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ing stations necessary for rendering service to the proposed communities so as to avoid placing the burden of the cost of the new facilities upon Northern's existing customers" (R. 375).

[7] *Northern Natural Gas Company*, Docket No. G-15335. Those rates were in effect, subject to refund if not ultimately justified, from November 27, 1958 (R. 83) until December 27, 1959, when the Commission's suspension of the next increased rate, filed June 26, 1959, expired (Pet. 6).

[8] Exhibits 9, 49, 50, 57, 161, 170, and 171 (R. 149, 253, 254, 264–265, 276 and 277).

[9] Exhibits 180 and 181 (R. 150–156, 238–242, 297–299). The Commission exhibits used a 6% rate of return solely for illustrative purposes (R. 239), which conforms to the usual Commission practice. However, adjustment of the prices to produce a specified change in intended rate of return on the *present system* would cause the use of those adjusted prices to produce the same change in the *expanded system* rate of return, because of the sufficiency of present system profits to offset the lower rate of profits on the new services.

ities * * * will be somewhat short of this, but will still represent a substantial return on its investment" (emphasis added).[10] The Commission concluded that the project was economically feasible (R. 374); but to "enhance" the feasibility it required capital contributions by certain of the communities, which contributions improved the return on the incremental facilities (R. 377–378).

Petitioners objected on the ground that the contributions required were insufficient to make the *incremental* facilities what they considered to be "economically feasible", *i.e.*, productive of as high a rate of return on investment as the existing system.[11] Thus, the Commission was looking to *system-wide* revenues, as it should, while petitioners were looking only to *incremental* revenues. Both the Commission (R. 379, 408–409) and the court below (Pet. 16) correctly held that the various parts of a utility system need not and cannot be equally profitable. It has long been settled that all that is required is that the over-all operations be sufficient to give the net returns to which the utility is entitled. *Puget Sound Traction, Light*

[10] R. 373–374; Ex. 162 (R. 266) showed an *incremental* return on the facilities in Docket No. G–17485 of 5.66%, and Exhibit 172 (R. 278), an *incremental* return on the facilities in Docket No. G–17486 of 4.20%.

[11] It is pertinent to note what was petitioners' real concern in this case, which did not escape the notice of the court below. In its opinion, the court said: "[Petitioners] object to the Commission's orders because, on the basis of the rates now charged Northern's customers, *the new service* will not yield to Northern in the first three years as high a percentage of profit as the present service, and may therefore tend *to keep up* the rates which petitioners pay to Northern" (Pet. 15–16; emphasis added).

and Power Co. v. *Reynolds*, 244 U.S. 574, 580–581; *St. Louis and San Francisco Railway Co.* v. *Gill*, 156 U.S. 649, 665–666. In these circumstances, the Commission did not merely assume an excess of revenues over the cost of service on the expanded system in the third year, as petitioners would have this Court believe (Pet. 2). The record fully supported it.

2. To escape from the unequivocal holding of the court below that the record supports the Commission's findings, petitioners now contend that the Commission should have determined economic feasibility in the light of the estimated costs Northern used to support its rate increase application of June 26, 1959, and that the court below should have remanded the proceedings for further hearings when petitioners raised that objection.

Petitioners assert that of the $10,000,000 increase requested in the rate filing of June 26, 1959, "About 1.5 million dollars of the increase was to cover Northern's claimed rate of return of 6¾% rather than 6½%; the balance of 8.5 million dollars was to cover Northern's claimed increases in its cost of gas" (Pet. Rep. Br. in the court of appeals, p. 6, fn. 4). But neither of those factors was material to the resolution of the issues before the Commission in the certificate proceedings.

In the first place, the rates which the Commission used to arrive at Northern's estimated revenues were intended to yield a 6½% rate of return rather than a 6¾% rate; and that they would do so on a system-wide, or "rolled-in", basis during the third year of operation of the expanded system, was demonstrated.

Northern's new claim that it is entitled to a 6¾% return instead of 6½% has nothing whatever to do with the economic feasibility of the proposed project.

Moreover, since the exhibits presented by Northern to justify the expansion were based upon currently effective rates, they likewise properly reflected the estimated cost of service on which those rates were based, instead of the estimated higher future purchased-gas costs on which the last increased rates were based. Petitioners concede (Pet. 4) that "Northern is entitled under existing Commission precedents to recover its entire cost of service in its rates." It follows therefore that, if Northern is entitled to higher rates by reason of the prospective increase in its cost of purchased gas, such rates would be applicable to the entire system as expanded; and petitioners cannot, as they attempt to do, ignore this fact and look only to the increased gas costs. Stated otherwise, any consideration of the last increase application in determining the economic feasibility of the project requires an entirely new revenue-cost picture. Consequently, petitioners' argument that the Commission should have used the estimated higher future purchased-gas costs with the estimated revenues based on the currently effective rates is fallacious. What revenues, on the expanded system as a whole in the third year of operation, may be forthcoming from rates designed to recover new gas costs cannot at this time be determined, particularly in view of anticipated further expansion in markets. But in light of the foregoing, the figures upon which petitioners rely in

no way show that the Commission's approval of the expansion project will place any "undue financial burden" upon petitioners.

3. In any event, petitioners may not now raise the objection which they present. Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b), provides in part:

> No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do.

Petitioners do not maintain, as they cannot, that they ever presented this objection to the Commission. Instead, they assert that they could not, on the ground that it was not until the Commission filed its answering brief in the court below that they had any knowledge of a claim that Northern's system-wide revenues from jurisdictional services after expansion would exceed its costs of service, including a 6½% return, by approximately $1,500,000. The $1,500,000 excess is not in itself significant. So long as Northern's system-wide revenues after expansion would exceed its cost of service, including a 6½% rate of return, by any amount, the project was economically feasible. In its brief in the lower court, the Commission did no more than make certain mathematical computations from the exhibits already in evidence to show the $1,500,000 excess. There was no reason why petitioners could not have made the same calculations. At the same time and from the same sources, petitioners were well aware of the cost figures which were

being used."[12] Likewise they were fully cognizant, at least by the time of oral argument to the Commission on July 17, 1959, that Northern had filed the rate increase application in Docket No. G-19040. Yet they did not maintain, or even indicate, in their application for rehearing before the Commission that the Commission should consider the costs as estimated in the new rate increase filing. In their application for rehearing which was filed on August 27, 1959 (R. 351), approximately four weeks after the Commission's opinion and order of July 31, 1959, and about nine weeks after Northern's application for the rate increase, petitioners challenged the Commission's order upon grounds which went solely to matters of record in the certificate proceeding (R. 336–351). Moreover, in their petition for review in the court below they did not present their current objection (R. 2–12). When, thereafter, they raised the question for the first time in their reply brief in the court of appeals, it came too late. The statutory bar precludes entertainment of their objection. *Sunray Mid-Continent Oil Co.* v. *F.P.C.*, 364 U.S. 137, 157; *F.P.C.* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 497–500; *Panhandle Eastern Pipe Line Co.* v. *F.P.C.*, 324 U.S. 635, 645, 649, 650.

[12] Petitioners "participated in the hearings, cross-examined witnesses, presented evidence, filed briefs and argued orally before [the Commission]" (R. 7).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1960.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MEMORANDUM IN OPPOSITION OF INTERVENOR-RESPONDENTS

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MEMORANDUM IN OPPOSITION OF INTERVENOR-RESPONDENTS

Intervenor-Respondents support the position taken by the Federal Power Commission (Commission) in its Brief in Opposition to the Petition for a Writ of Certiorari. This statement of reasons for denial of the Writ is submitted in the nature of a supplement to the Commission's Brief.

Analysis of the Petition demonstrates that the entire fabric of Petitioners' argument is woven about a single Point, their contention that the Commission erred in issuing a certificate of public convenience and necessity to Northern Natural Gas Company (Northern) authorizing initial service to certain new communities because figures bearing on costs and revenues presented by Northern in a rate proceeding now pending before the Commmission differ from certain estimates of costs and revenues which were of record in the instant certificate proceeding.

Northern's instant certificate applications were filed on January 12, 1959 and hearings held thereon between April 20, 1959 and June 18, 1959. The overall economic effect of Northern's proposal to provide initial gas service to the new communities here involved was tested by the only proper evidence that could be adduced at either the time of filing the applications or at the time of hearing, i.e. overall system-wide cost and revenue data associated with and deriving from those rates then currently in effect and which would be charged to old and new communities alike. No valid purpose could have been or would now be served by developing a still further record testing the economic impact of Northern's expansion program upon the hypothesis of changed or even higher costs, since if system-wide costs change then so will system-wide revenues because rates designed to recoup such changed costs will necessarily be made effective and will be collected from all who are served from the system, be they old or new customers.

Moreover, the Commission's Order and the decision of the Court below must be sustained even if, as Peti-

tioners argue, Northern's system before expansion had a deficiency rather than an excess in revenues. All of the evidence of record, including that presented by Petitioners, established that, standing alone, on an incremental basis, estimated revenues from the new communities would be sufficient to cover annual costs and yield some measure of profit or return on Northern's investment. And, as the Court below pointed out, citing *Puget Sound Traction Light & Power Co.* v. *Reynolds*, 244 U.S. 574, 581 (1917), the various parts of a public utility system need not and cannot be equally profitable.

The issue here cannot properly be held to be one solely of economics. On the contrary, economics is only one factor in a total complex of many factors which must be considered by the Commission in deciding whether a natural gas expansion project, designed to serve those who have not had natural gas service, is required by the public convenience and necessity. Cf. *U. S.* v. *Detroit & Cleveland Navigation Co.*, 326 U.S. 236, 241 (1945).

Petitioners' approach ignores the most important, compelling and uncontradicted evidence in this case: the proven need for natural gas in the communities sought to be served. The case on their behalf, made by Northern and the distributors in those communities, was complete. To disturb the Commission's findings and order which certificated the new service and to require a rehearing on the narrow economic issue sought to be raised by Petitioners would not serve the public interest but would instead impose an undue and unnecessary burden on the Commission and the parties to the proceeding below.

The Commission's Order in this case was issued on the basis of a record which contained substantial evidence bearing upon the many factors which the Commission must weigh in determining the requirements of public convenience and necessity. As the Court below stated, "The Commission properly weighed the interests that will be served against those that will be injured and did not strike an arbitrary balance."

Finally, it must be noted that the objection to the Commission's Order, which Petitioners now urge before this Court, was not raised by Petitioners in their Joint Application for Rehearing filed with the Commission under date of August 27, 1959 (R. 11721-38), two months after Northern's rate increase filing was made. Petitioners were fully aware of that filing, yet no mention of the objection now being urged before this Court was set forth in their Application for Rehearing. Section 19 of the Natural Gas Act (15 U.S.C. 717r) provides that an Application for Rehearing to the Commission "shall set forth specifically the ground or grounds upon which such application is based" (Section 19(a)) and further provides that:

> "No objection to the order of the Commission shall be considered by the Court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure to do so. * * *". (Sec. 19(b)).

The Petition for Certiorari is fatally defective on both substantive and procedural grounds. It should be denied.

Respectfully submitted,

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